

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 26858-s40H BY I X RANCH)	
)	

* * * * *

Exception and objection has been made to the Proposal for Decision in this matter by the Department of Natural Resources and Conservation acting through its Havre Field Office, by the Applicant I X Ranch Co., and by the Objectors Glasgow and Malta Irrigation Districts.

DEPARTMENT'S OBJECTIONS

The Department asserts that the Proposal for Decision in this matter is not supported by the evidence in that the testimony and exhibits of the Department reflect that there is unappropriated water available from the Milk at times through any given year. In short, the Department argues that the evidence of relatively high flows at the USGS Nashua recording station at times throughout the year shows that spills must be occurring at Vandalia dam, and hence that unappropriated waters must exist for new uses.

As a starting point, it can be reasonably assumed that Nashua flows bear a close enough correlation to Vandalia flows for present purposes, since there appears to be no intervening source of supplies except for accruing return flows. Moreover, there is little danger in assuming that Nashua flows do exceed the diversion capacity at Vandalia at times throughout the year, although this occurs most regularly and consistently in the months of March and April. Although the Department exhibits are grouped in six-month increments in times of average flow, with each increment including the high-flow month of March or April, it is unrealistic to assume that all the high flow periods depicted thereon occur in such months.

However, this does not end the analysis of unappropriated water. The diversion capacity at Vandalia is only a relatively small fraction of the diversion capacity of the Bureau of Reclamation's Dodson facility. Therefore, the existence of spills at Vandalia does not inevitably assure that there is sufficient water at Dodson to satisfy all the uses that Dodson serves. This is particularly true at such times that the Bureau's Nelson Reservoir is drafting from storage to augment the flow of the Milk River for the uses associated with the Vandalia diversion. Since the Applicant herein proposes to divert waters from a Milk River tributary upstream from the Bureau's Dodson diversion facility, it does not inevitably follow that limiting diversions to times of Vandalia spill will in all cases protect the prior uses associated with the Bureau's

project or assure that the Applicant will be diverting only unappropriated waters. Since the inference of no unappropriated water is equally as strong or stronger than the existence of surplus water, the former must be concluded as the burden of proof resides with the Applicant. MCA 85-2-311(1981). For these reasons, the Hearings Examiner limited diversions to March and April.

March and April are likely to reflect close correlation between Vandalia spills and satisfaction of diversion requirements at Dodson. Firstly, these months reflect times during which any run-off will be a more or less a basin-wide event. Summer accretions can reasonably be expected to have more isolated effects, with the attendant difficulties of using Vandalia as a barometer of all the Bureau's needs. Secondly, there is likely to be little irrigation in these months in most years, and therefore there need be little concern with diversion requirements at Dodson. Lastly, it is not likely that the Bureau will be supplementing the flows of the Milk River with Fresno or Nelson storage at such times, which events would render unpredictable the relationship between flows at Vandalia and Dodson diversions dams.

However, the Proposal for Decision failed to go far enough in light of these rationales. At such times that there is little demand for irrigation waters, there is a consequent lack of need to address the problems of Dodson requirements. Moreover, during those non-irrigation seasons, there is likely

to be little storage water from Fresno or Dodson supplementing the flow of the Milk River.

Therefore, there is evidence in the record sufficient to convince a reasonable mind that unappropriated waters will exist for Applicant's use throughout the winter months, at such times that Vandalia spills. Since the burden of proof is on the Applicant, these "winter" months comprising the non-irrigating season will be considered for purposes herein as commencing on October 1.

The Department notes that the Bureau exercises some water uses during the winter months, apparently being limited to augmentation of Milk River flows with Fresno storage for downstream municipal uses. However, this does not militate against the conclusion reached herein as these uses do not command high diversion requirements at Dodson. Moreover, while the Applicant may not demand waters in its own right from the Bureau's storage facilities, there is no reason why it cannot claim the returns from such uses after such stored waters have served their purpose.

These winter times[✓] uses of the Bureau are deserving of protection, however, and hence Applicant must be limited to diversions to such times as Vandalia spills water. The Bureau cannot be compelled on this record to sacrifice its carry-over storage capacity to provide for depletions generated by Applicant's diversions. While the record does not indicate that such winter time flows will produce reliable or consistent water

flows for the Applicant, this condition should not prevent this storage appropriator from taking advantage of whatever water may become available from chinook winds or the like. In implementing this condition, the Department extends the release schedule reflected in the Proposal for Decision to one month periods, as evaporation losses are likely to be minimal at such times and as the Bureau's winter water requirements are relatively small.

Whether the Bureau should be required to utilize its storage waters for current uses in any given year instead of reserving them for use in future years, which practice would increase the incidence of unappropriated waters, cannot be determined on this record. There is not sufficient evidence in the record as to the time the Bureau's needs commonly arise in relation to the probable and reliable annual flows that may be expected at such times. Since the burden of proof is on the Applicant, this potential means of alleviating shortages is unavailing.

APPLICANT'S OBJECTIONS

The Applicant objects to the language contained in the Proposal for Decision to the effect that the ownership of the rights attendant to the Bureau's project uses is immaterial. That language, however, merely regards such ownership as between the Bureau and the actual water users as immaterial to the present proceedings. The Department hereby affirms this particular conclusion.

The Applicant also renews his claims that his present existing rights are sufficient authority for his proposed use, and that therefore the matter at issue is not a new water use permit. Much of these arguments have already been discussed in the Proposal for Decision. This procedure is in fact an application for a new water use permit. Such was the application made, and such was the notice had in accordance thereto. If the Applicant desires to change his existing rights, he may do so in the matter envisioned by the statutes, which entails an application for authorization to change an existing right and Notice of Hearing in accordance therewith. See MCA 85-2-403 (1981).

A water right is limited to historical beneficial use. Therefore, notwithstanding that Applicant already apparently owns a storage right, at the minimum it is necessary to change its point of diversion to that contemplated by the present application. Moreover, Applicant may only change what he has, and any extension of use either can temporally or quantitatively necessarily result in a new use, a new priority, and a concomitant requirement for a new water use permit.

"It seems indisputable that a water user who has been decreed the right to use a certain number of inches of water upon lands for which a beneficial use has been proven, cannot subsequently extend the use of that water to additional lands not under actual or contemplated irrigation at the time the right was decreed, to the entry of subsequent appropriators. Obviously, if he could do so, junior appropriations might be of little or no benefit..." Quigley v. McIntosh, 110 Mont. 495, 505, 103 P. 2nd 1067 (1939).

In Featherman v. Hennessy, 43 Mont. 310, 115 P. 983 (1911), the defendant converted a right historically used for producing power to agricultural purposes. The court found that "(t)his was a change in the original use and resulted in the consumption of the quantity so diverted to the new use, and therefore amounted pro tanto to a new appropriation. Such being the case, under the rule above stated, the court reached the proper conclusion, to-wit, that the right to use this amount for this purpose must bear the date at which the change was made." 43 Mont. at 317.

The existence of established water rights thus gives an appropriator no right to increase his demand upon the source of supply without appropriating additional water. Any contrary rule would emasculate any concept of changes of existing rights, and frustrate water development in the state of Montana as any junior appropriator would have little security in future water supplies so as to justify the capital investment for diversion works if senior appropriators could, at their will, change the historic pattern of water availability^a in the source of supply.

MALTA AND GLASGOW IRRIGATION
DISTRICTS OBJECTIONS

The Irrigation Districts submit a number of proposed conditions for the disposition of this matter. Initially, they request that the Applicant be required to check with the Bureau of Reclamation at Malta at the beginning of each season to

ascertain a forecast of water availability for that year. The Order in this matter will be revised to provide the Applicant with the name and address of Bureau officials so that the terms of the order can be conveniently adhered to. While the Applicant may certainly benefit from checking with the Bureau of Reclamation for water availability forecasts, no additional protections for prior existing rights are required other than those already evidenced in the Proposal for Decision.

The Irrigation Districts also argue that any diversions should be limited to periods before March 15th. Such a limitation is not in accord with the evidence in this matter and is rejected. The Districts further argue that the restrictions contained in the Proposal for Decision limiting diversions to spill be gauged with reference to the Dodson diversion dam. As indicated herein, Dodson diversion dam may indeed be the pivotal focus for the Bureau of Reclamation's water uses. However, the Department on this record is unsure whether such a limitation would not result in ambiguities as to water levels and requirements at Vandalia. For these reasons, the burden of proof being on the Applicant, Vandalia spill will be utilized in accordance with the restrictions found herein and in the Proposal for Decision.

The Irrigation Districts also claim the Conclusion of Law number 12 should be amended to read that whenever Vandalia fails to spill, there are no unappropriated waters in the upstream reaches of the Milk River system. The failure to include the

negative was a clerical error, and Conclusion of Law number 12 is ammended to read in the negative in this particular.

Finally, the Irrigation Districts argue that a provision should be included in the Order providing that the Department of Natural Resources and Conservation may make periodic on sight checks to assure that Applicant is in compliance with the terms of this permit. This condition is necessarily implied in the Order. The Department has authority to revoke permits if the terms and conditions thereof are not being complied with. MCA 85-2-314 (1981). Moreover, MCA 85-2-115 (1981), authorizes any employee or agent of the department to enter upon land to carry out the purposes of this chapter, including the aforesaid purpose reflected by the revocation provision, upon giving reasonable notice to the landowner of its intention to so enter upon such land.

Comment - the districts can sue the permittee also, revoking a permit is the most extreme action.

WHEREFORE, based on these Findings of Fact and Conclusions of Law, the following final order is hereby issued.

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 26858-s40H is hereby granted to I X Ranch Co. to appropriate and store up to 500 acre-feet per year at a rate not to exceed 12 cubic feet per second. Diversions for storage shall in no event take place prior to November 1 of any given year, nor subsequent to April 30 of any given year. The use of the waters so stored

shall be supplemental flood and sprinkler irrigation of 2760 acres, more or less, comprised of the following parcels: 160 acres in the SE1/4 of Section 19, Township 28 North, Range 13 East; 320 acres in the W1/2 of Section 20, Township 28 North, Range 13 East; 120 acres in the SW1/4 and 40 acres in the NW1/4 and 80 acres in the SE1/4 of Section 28, Township 28 North, Range 13 East; 320 acres in the W1/2 and 40 acres in the SW1/4 SE1/4 of Section 29, Township 28 North, Range 13 East; 80 acres in the S1/2 NW1/4 and 80 acres in the N1/2 SW1/4 of Section 30, Township 28 North, Range 13 East, 320 acres in the E1/2 and 80 acres in the E1/2 NW1/4 of Section 31, Township 28 North, Range 13 East; 160 acres in the NW1/4 and 160 acres in the SW1/4 and 160 acres in the SE1/4 and 80 acres in the S1/2 NE1/4 and 40 acres in the NW1/⁴/₂ NE1/4 of Section 32, Township 28 North, Range 13 East; 80 acres in the W1/2 NE1/4 and 160 acres in the NW1/4 and 160 acres in the SW1/4 and 80 acres in the W1/2 SE1/4 and 40 acres in the SE1/4 SE1/4 of Section 33, Township 28 North, Range 13 East, all in Chouteau County. The period of use of the water so stored shall be between May 1 and September 30, inclusive, of each year. The point of diversion for the waters claimed herein shall be a dam located in the NE1/4 SW1/4 SW1/4 of Section 8, Township 27 North, Range 14 East, all in Chouteau County. The source of supply shall be Godfrey Creek, a tributary of Big Sandy Creek. The priority date for this permit shall be March 10, 1980, at 10:34 a.m.

This permit is subject to the following express conditions, restrictions, and limitations.

CASE # 26858

A. Any rights evidenced herein are subject to all prior and existing rights, and any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize the Permittee to interfere with the natural flows of Godfrey Creek to the detriment of any senior appropriator.

B. This permit is also subject to the rights of the Water and Power Resources Service (now known as the Bureau of Reclamation) of the United States of America to use the waters of the Milk River Basin for agriculture, irrigation, municipal, domestic, industrial, and any other authorized purpose pursuant to its "Milk River Project". Whenever Vandalia Diversion Dam spills water, the Water and Power Resources Service's water claims have been satisfied, and there are unappropriated waters available for the Applicant that may be diverted without adverse affect to the Water and Power Resource Service. "Spilling" as used herein refers to waters passing over the diversion structure known as Vandalia Diversion Dam.

C. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages that may be caused by the exercise of this permit. Nor does the Department of Natural Resources and Conservation in issuing this permit acknowledge any liability for any damages caused by the exercise of this permit, even if such damage is the necessary and unavoidable consequence of the same. ✓

D. The Permittee shall in no event cause to be diverted from the waters stored pursuant to this permit more water than is reasonably required for the purposes provided for herein. At all times when water is not reasonably required for these purposes, Permittee shall cause or otherwise allow the waters to remain in storage.

E. Permittee shall diligently adhere to the terms and conditions of this Order. Failure to adhere to the terms and conditions may result in the revocation of this permit.

F. Permittee shall not divert at its existing ditches from Big Sandy Creek more water pursuant to this Permit than is discharged or released from the reservoir provided for herein.

G. In all events, at such times that Applicant succeeds in capturing 500 acre-feet in the storage structure provided for herein, inflows must be equivalent to outflows until the time of diversion for storage in the next ensuing year.

H. On October 1 of any given year, Permittee shall estimate and record the amount in storage at such time, which quantity shall be part and parcel of the next ensuing year's appropriative limit. Thereafter, at periods no greater than 30 days duration, Permittee shall insure itself that spills have occurred at the Water and Power Resources Service's Vandalia Dam. In the event that waters fail to spill at Vandalia Dam during any such 30-day period, Permittee shall release the water stored during such 30-day period for downstream use. Permittee shall continue to monitor and record water levels in the storage


structure provided for herein at such 30-day intervals until March 1st of any given year. On March 1st of any given year, at periods no greater than 14 days duration, the Permittee shall again assure itself the spills have occurred at the Water and Power Resources Service's Vandalia Dam. In the event that waters fail to spill at Vandalia Dam during such two-week interims, Permittee shall release the water stored during such 14-day periods for downstream use. Permittee shall continue to monitor water levels in the storage structure provided for herein at such two-week intervals throughout the remainder of the period provided for herein for diversions into storage. ✓

I. The Applicant may contact the Bureau of Reclamation at Box R, in Malta, Montana, for assistance in implementing the conditions herein.


NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 5th day of March, 1982.



Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 449 - 2872



Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

CASE # 26858

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 26858-S4CH BY I X RANCH CO.)

* * * * *

Pursuant to the Montana Water Use Act and the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Havre, Montana.

STATEMENT OF THE CASE

On March 10, 1980, an Application for Beneficial Water Use Permit was filed with the Department of Natural Resources and Conservation by I X Ranch Co. acting through Arthur Roth, President thereof. The Application seeks 12 cubic feet per second up to 500 acre-feet per year for supplemental irrigation of 2,760 acres more or less located in Chouteau County. The Applicant claims the right to divert and use such waters from March 25 through September 30, inclusive, of each year. The point of diversion for said waters is claimed to be located in the NE1/4 SW1/4 SW1/4 of Section 8, Township 27 North, Range 14 East, all in Chouteau County. The means of diversion are proposed to be an on-stream dam located on Godfrey Creek, a tributary of Big Sandy Creek. Mr. Arthur Roth appeared personally at the hearing in this matter in support of the

CASE # 26858

application. Pertinent portions of this application were published for three successive weeks in the Mountaineer, a newspaper of general circulation printed and published in Big Sandy, Montana.

An objection to the granting of the above-stated application was filed with the Department of Natural Resources and Conservation on behalf of Harlem Irrigation District. This objection alleges generally that there are no unappropriated waters available for Applicant's use, and that the granting of the application would adversely affect downstream water users within the "Milk River Project". Mr. Gilbert Anderson appeared and purported to act on behalf of Harlem Irrigation District.

Objections were also filed to the granting of the above-stated application by Zurich and Alfalfa Irrigation Districts. However, no person appeared purporting to represent the interests of these entities at the hearing in this matter.

On September 2, 1980, objections to the granting of this application were also filed on behalf of Glasgow Irrigation District. Faye Seal appeared at the hearing purporting to represent the interests of these entities. All of these objections claim that there is insufficient water for Applicant's use without adversely affecting on-stream water users within the "Milk River Project".

On August 26, 1980, an objection to the granting of the above-stated application was filed with the Department of Natural Resources and Conservation by the Water and Power Resources Service of the United States of America. This entity is now

CASE #

known as the Bureau of Reclamation. The objection states and alleges generally that new consumptive uses of water in the Milk River Basin above Vandalia Diversion Dam will adversely affect the existing water rights of the Milk River Project and that all natural flow of the Milk River that can be used for irrigation development has already been appropriated.

EXHIBITS

The Applicant offered into the record the following exhibits, to-wit:

A-1 through A-5: Copies of "Notices of Appropriation" which Applicant herein claims evidences its rights to the use of water.

A-6 through A-7: Copies of Decrees reflecting water uses of I X Ranch Co.

A-8: A USGS map depicting in pencil the drainage area of Applicant's proposed dam, with the proposed place of use bordered in black and the proposed point of diversion referenced thereon in blue..

All of Applicant's Exhibits were received into the record.

Objectors Malta Irrigation District and Glasgow Irrigation District and Dodson Irrigation District offered three exhibits into the record, to-wit:

C (Districts) 1 through 3: Identical copies of letters purporting to set forth the factual basis for their claims that there are no unappropriated waters available in the Milk River Drainage and that any additional diversions will adversely affect water users of said Districts.

The Districts exhibits were received into the record.

Water and Power Resources Service offered the following exhibits into the record, to-wit:

WPR 1A and 1B: Maps purporting to show points of diversion and places of use of waters claimed by the Water and Power Resources Service pursuant to its Milk River Project together with explanatory comments and maps on the back of said exhibits.

WPR 2: Copy of an International Joint Commission Order pursuant to treaty between the United States and Canada reflecting the allocation of the waters in the St. Mary and Milk River drainages between the two said entities.

WPR 4: A copy of a graph reflecting water storage at WPR's Fresno Reservoir from 1971 through 1980, inclusive.

WPR 5: A graph of water availability at WPR's Dodson South Canal Diversion from 1964 through 1973, inclusive.

WPR 6: A copy of a graph showing average shortage of water at WPR's Dodson South Canal from 1964 through 1973, inclusive.

WPR 7: A graph depicting water shortages at Dodson South Canal in 1973.

WPR 8: USGS gauging measurements made of the Milk River Basin at various points.

All of Objector's Water and Power Resources exhibits were received into the record.

The Department offered into the record the following exhibits, to-wit:

D-1: A field report by Bob Larson, Area Office Supervisor for the Department's Havre Field Office relating the results of his investigation of the matters raised by the present application.

D-2: A copy of the USGS map showing the source of supply Godfrey Creek in blue and the drainage area thereof cross-hatched in red.

D-3: A map showing applicant's proposed place of use cross-hatched in red.

D-4: A map showing locations and results of various storms in the drainage area, together with USGS gauging records on the Milk River at Havre, Montana.

CASE # 26858

D-5: A map showing the location, times and severity of local storms in the drainage basin, together with USGS gauging station records on the Milk River at Nashua, Montana.

D-6: A compilation of USGS gauging station discharges made at the Milk River Eastern Crossing at the Canadian border.

D-7: A compilation of USGS gauging station discharges measured at Nashua, Montana, on the Milk River.

D-8: Graphs prepared by Bob Larson showing water availability in the Milk River as measured at the USGS gauging station at Nashua. The red circles thereon reflect the measurements made at the Eastern Crossing of the Milk on the Canadian Border.

D-9: A graph prepared by the Department showing water availability in the Milk River in the non-irrigating season as measured at Nashua, Montana.

D-10: A graph prepared by the Department showing water availability at the Milk River Eastern Crossing at the Canadian Border.

D-11: A Department study of water availability in the Milk River Basin.

All of Department exhibits were duly received into the record.

PRELIMINARY MATTERS

Water and Power Resources Service of the United States of America objected to the receipt into evidence of any Notices of Appropriation or Decrees purporting to evidence rights to water the Applicant herein presently owns or claims. This objection was grounded on the assertion that the proceedings involve an application for a new water use permit, and in no wise entail issues relating to any changes of existing rights. The Hearing Examiner ruled at the hearing and does now reaffirm that said

notices or decrees are immaterial insofar as they purport to establish any right to the new application involved herein. Applications of new water use permits and applications for authorizations to change existing rights are fundamentally of different character. Compare 85-2-301 (1979) with 85-2-402 (1979).

The issues raised by these different proceedings and the effect of administrative approval of the respective applications are of entirely different orientations. A new water use permit, for example, can bear a priority date no earlier than the date the application for same was filed with the Department of Natural Resources and Conservation. See MCA 85-2-401(2) (1979). Since the fundamental rule remains "first in time, first in right," see MCA 85-2-401(1) (1979), any rights evidenced by such a permit remain inferior to any established water uses. Change proceedings, in contradistinction, result in the transfer of the old priority reflected by the historic use contemplated in the change. Similarly, in change proceedings, the burden of showing adverse effect or injury is upon the objectors, while such burden resides with the applicant in an application for a new water use permit. See generally MCA 85-2-311(7) (1981 amend.); Hansen v. Larsen, 44 Mont. 350, 120 P. 229 (1911), Lokowich v. Helena, 46 Mont. 475, 129 P. 1063 (1913).

The notice given of this matter reflected the character of a proceeding for a new water use permit. The present proceedings cannot now be realigned to address issues related to a change of

CASE # 26858

an existing right without substantially frustrating the notice provisions delineated in the statutes and without substantially misleading those having received actual notice in accordance with the original claim made in this matter. Therefore, the evidence of existing rights propounded by the applicant herein is relevant and material only to the Applicant's need for an additional water supply, and hence whether the granting of this application would result in a beneficial use of water. See generally MCA 85-2-311(4) (1981). Nothing herein should be construed of course as determining any right of the Applicant to change any of its existing rights to the uses proposed herein in an appropriate proceeding.

Nothing herein should also be construed as determining the ownership of any water rights as between the Water and Power Resources Service and the associated water user districts. These objectors all claim waters pursuant to the so-called Milk River Project, an enterprise apparently authorized pursuant to the Reclamation Act of 1902 and any amendments thereto. Whether or not the United States through the Water and Power Resources Service owns the right attendant to this project is immaterial in the present proceeding. See generally *Ickes v. Fox*, 300 U.S. 82, 61 L. Ed. 525, 57 Sup. Ct. 412 (1937). The Hearing Examiner concludes that at least the United States through the Water and Power Resources Service has an interest in the water and water use associated with its diversion facilities of a sufficient capacity to maintain an action for their protection. See generally *United States v. Bennett*, 207 F. 524 (9th Cir. 1913);

United States v. Fumboldt Lovelock Irrig., 97 F. 2d 38 (9th Cir.), cert. den., 305 U.S. 630 (1938). For the purposes of this proceeding, the interest of the Water and Power Resources Service and the interest of the various objector irrigation districts are considered to be one and the same.

Objection to the notice provision for the instant application was also made by Harlem Irrigation District. Specifically, this objection claims that notice was inadequate since the application was filed on March 10 of 1980 and was not advertised until July 16, 1980, and that said application was not published in the area of the Milk River Project. Without specifically passing on the standing of this objector to raise such an issue since that objector itself appeared at the hearing and claims no specific prejudice from the notice provisions followed, it is enough to observe that the first grounds of objection are entirely immaterial. This Hearing Examiner fails to see the relevance of the time elapsed between the filing of the application and the notice thereof to any issues raised by reasonable notice itself.

The assertion of the inadequacy of the extent of the notice is more cogent. MCA 85-2-307(1) (1981) provides that "(u)pon receipt of a proper application for a permit, the Department shall prepare a notice containing the facts pertinent to the application itself and shall publish the notice in a newspaper of general circulation in the area of the source once a week for three consecutive weeks. Before the last date of publication, the Department shall also serve the notice by first-class mail

CASE # 26858

44 31 13

upon any appropriator of water or applicant or holder of a permit who, according to the records of the Department, may be affected by the proposed appropriation." The public notice in this matter substantially complied with the aforesaid statutory requirements, and the Hearing Examiner has also noted that service was had by mail upon Water and Power Resources Service. Whether or not these statutory requirements comply with due process demands of the State and Federal Constitutions, see generally Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 94 L. Ed. 865, 70 Sup. Ct. 652 (1950); Schroeder v. City of New York, 371 U.S. 208, 9 L. Ed. 2d 255, 83 Sup. Ct. 279 (1962), cannot be determined on this scant record. In this latter regard, it is sufficient to note that by the appearance of Harlem Irrigation District herein it appears that all constitutional requirements as regards this objector have been satisfied.

FINDINGS OF FACT

1. The application in this matter was duly and regularly filed with the Department of Natural Resources and Conservation on March 10, 1980, at 10:34 a.m.

2. The source of supply for the waters claimed herein is Godfrey Creek, which is a tributary of Big Sandy Creek, which is in turn tributary to the Milk River.

3. The President of I H Ranch, Arthur Roth, is experienced in irrigation and agriculture and has knowledge and experience with the water requirements of crops.

CASE # 26858

1122AC

4. The Applicant intends to construct an on-stream reservoir on Godfrey Creek with a capacity of 500 acre-feet in substantial accordance with Soil Conservation Service standards.

5. The drainage area of Godfrey Creek is sufficient to discharge 500 acre-feet per year on a relatively regular basis.

6. The use of 500 acre-feet of water by the Applicant herein would be of material benefit to him. The Applicant intends to use such waters to supplement the irrigation of 2,760 acres more or less located in the following areas: 160 acres in the SE1/4 of Section 19; 320 acres in the W1/2 of Section 20; 120 acres in the SW1/4 of Section 28; 40 acres in the NW1/4 of Section 28; 80 acres in the SE1/4 of Section 28; 320 acres in the W1/2 of Section 29; 40 acres in the SW1/4 SE1/4 of Section 29; 80 acres in the S1/2 NW1/4 of Section 30; 80 acres in the NW1/2 SW1/4 of Section 30; 320 acres in the E1/2 of Section 31; 80 acres in the E1/2 NW1/4 of Section 31; 160 acres in the NW1/4 of Section 32; 160 acres in the SW1/4 of Section 32; 160 acres in the SE1/4 of Section 32; 80 acres in the S1/2 NE1/4 of Section 32; 40 acres in the NW1/4 NE1/4 of Section 32; 80 acres in the W1/2 NE1/4 of Section 33; 160 acres in the NW1/4 of Section 33; 160 acres in the SW1/4 of Section 33; 80 acres in the W1/2 SE1/4 of Section 33; 40 acres in the SE1/4 SE1/4 of Section 33; all in Township 28 North, Range 13 East in Chouteau County. The storage of 500 acre-feet is a reasonable estimate of the quantity of water that the Applicant can use from March 25 to September 30, inclusive, of any give year. The flow rate of 12 cubic feet per second is also a reasonable flow rate to

CASE # 26858

*** 38A0**

fill the reservoir and to redivert the quantities thus stored through existing irrigation ditches. These existing ditches have a capacity to handle such flows.

6. The proposed means of diversion are customary for their intended purposes, and will not result in the waste of water. Applicant intends to impound high spring flows in the aforesaid on-stream reservoir at a point in the NE1/4 SW1/4 SW1/4 of Section 8, Township 27 North, Range 14 East, all in Chouteau County. The waters so impounded by this reservoir will be released and rediverted by existing ditches owned by the Applicant on Big Sandy Creek. The Applicant also intends to carry over any water not used in any current year into succeeding years for use therein. This practice is reasonable in light of the unpredictable quantities of water that may be available in this generally arid region. The Applicant's proposed means of diversion are adequate for his intended appropriation.

7. The Water and Power Resources Service of the United States of America manages a system of storage structures and other diversion works that capture waters of the Milk River drainage and the St. Mary River drainage. These storage dams, diversion dams, and related canals span a significant reach of the Milk River, and they are all operated as a system for water delivery for municipal, irrigation and agriculture, and fish and wildlife purposes. Some 350,000 acre-feet of water per year, when available, is diverted or otherwise controlled by the Bureau of Reclamation for the above-described purposes.

CASE # 26958

CASE # 26958

8. After April 30 of any given year, the Bureau of Reclamation's water uses require all available flow in the Milk River. There is therefore no unappropriated water available for Applicant's uses beyond such time. In many years, there will be no unappropriated water for Applicant's uses substantially prior to this time. Vandalia diversion dam is the last diversion point of the Bureau of Reclamation's "Milk River Project" on the Milk River. Whenever water spills over this dam, there will be unappropriated waters available for Applicant's proposed use.

9. There are no permits or water reservations apparent from the face of the record which the present application may conceivably affect.

10. Applicant's proposed water use will adversely affect the water uses of the Bureau of Reclamation's "Milk River Project" unless Applicant's use is properly conditioned. The record herein reflects that no unappropriated water is available for Applicant's proposed use prior to March 1 of any given year nor subsequent to April 30 of any given year. Diversions prior or subsequent to such times would capture water that would otherwise be used by the Bureau. Moreover, whenever Applicant diverts waters in quantities that would not in the natural course of events be part of the spill at Vandalia Diversion Dam, Applicant will be taking unappropriated water and such diversions will adversely affect the Bureau's "Milk River Project".

11. The Application in this matter was duly and regularly filed with the Department of Natural Resources and Conservation on March 10, 1960, at 10:34 a.m.

CASE # 26858

CONCLUSIONS OF LAW

1. NCA 85-2-311 (1981) directs the Department of Natural Resources and Conservation to issue a new water use permit if the following conditions or criteria exist:

(1) There are unappropriated waters in the source of supply:

(a) at time when the water can be put to the use proposed by the applicant;

(b) in the amount the applicant seeks to appropriate; and

(c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(2) the rights of a prior appropriator will not be adversely affected;

(3) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(4) the proposed use of water is a beneficial use;

(5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;

(6) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;

(7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through (5).

2. The Applicant is not seeking an appropriation of 10,000 acre-feet a year or more and more than 15 cubic feet per second, and therefore must prove by substantial credible evidence that the statutory criteria exists.

3. Applicant's proposed appropriation contemplates a beneficial use. Agriculture and irrigation are expressly defined by statute as being among the class of uses that are to be

CASE # 26858

*** 32AC**

regarded as beneficial. See MCA 85-2-102(2) (1979). Moreover, the record reflects that the use of 500 acre-feet of water is a reasonable estimate of the quantity of water required for applicant's purposes. The evidence herein shows that Godfrey Creek and Big Sandy Creek are streams of intermittent natures, particularly in late season irrigation months. By diverting and storing high flow spring waters and subsequently using these waters in such late season months, Applicant can materially benefit his agricultural operation. The use of water requested in the instant matter is therefore a beneficial one. See generally, Worden v. Alexander, 108 Mont. 208, 90 P. 2d 169 (1939); Savre v. Johnson, 33 Mont. 15, 81 P. 389 (1905).

4. Applicant's proposed use will not interfere with any permit or water reservation.

5. Applicant's proposed means of diversion, construction, and operation of his appropriative works are adequate for his intended purposes, and will not result in the waste of the water resource. The record reflects that Applicant will construct an earth-filled dam according to SCS specifications. Said dam will hold and contain regularly occurring flows of Godfrey Creek, and will not through seepage or otherwise result in the waste of the water resource. See generally, State ex rel Crowley v. District Court, 108 Mont. 89, 88 P. 2d 23 (1939). Applicant's earth-filled dam is to be constructed on Godfrey Creek at a point in the NE1/4 SW1/4 SW1/4 of Section 8, Township 27 North, Range 14 East. Applicant intends to release such stored waters and red divert the same by existing ditch diversions located at Big

Sandy Creek. The waters will be ultimately supplied to the place of use by a system of flood and sprinkler irrigation. Said means of diversion are customary for their intended purposes.

Applicant cannot, of course, divert more water out of Big Sandy Creek through the existing ditch diversions than is placed in Big Sandy Creek by the reservoir contemplated herein. 85-2-413 (1979). To meet this end, Applicant must install and maintain adequate measuring devices so that excess quantities will not be diverted. Applicant must also, of course, account for seepage and evaporative losses that will accrue to the waters so released from the reservoir until they are rediverted by the existing ditch diversions. However, this requirement is self-policing in the present circumstances because there are no practical means of measurement with sufficient tolerances to adequately account for any such seepage or evaporative losses over the short distance these waters will travel.

6. The place of use of the waters claimed shall be 160 acres in the SE1/4 of Section 19, 320 acres in the E1/2 of Section 20, 240 acres in the S1/2 SW1/4 and NW1/4 SW1/4 and SW1/4 NW1/4 and NW1/4 SE1/4 and SW1/4 SE1/4 of Section 28, 360 acres in the E1/2 SW1/4 SE1/4 of Section 29, 160 acres in the S1/2 NW1/4 and the E1/2 SW1/4 of Section 30, 400 acres in the E1/2 and E1/2 NW1/4 of Section 31, 600 acres in Section 32 excepting the NE1/4 NE1/4 thereof, and 520 acres in Section 33, excepting the E1/2 NE1/4 and the NE1/4 SE1/4, all of which acreage is located in Township 28 North, Range 13 East, in Chouteau County.

7. The Applicant intends to use the waters claimed herein from March 25 through September 30, inclusive, of any given year.

8. The Applicant has a bona fide intent to appropriate water, and is not attempting to speculate in the water resource. See generally Toohay v. Campbell, 24 Mont. 13, 60 P. 396 (1900).

9. The source of supply for the waters claimed herein will be Godfrey Creek, which is tributary to Big Sandy Creek, which is in turn tributary to the Milk River.

10. Applicant's proposed water use will be highly consumptive. That is, a significant amount of the waters diverted from the source of supply will be used up by the crops and lost to downstream water users.

11. There are unappropriated waters available for Applicant's use, but not throughout the period through which Applicant claims the right to divert these waters. The substantial credible evidence available on the record does not support a conclusion that there are waters available for appropriation after April 30 of any given year nor prior to March 1 of any given year. The Bureau of Reclamation's water uses reflected in the record appear to require substantially the whole flow available in the Milk River before or after these dates. Nor does anything in the record in the present matter warrant any conclusion that the Bureau is wasting water or using the same unlawfully. The burden of proof is on the Applicant in these regards. KCA 85-2-311(7) (1981).

It is true that the record reflects that the Bureau presently uses or authorizes the use of water for non-agricultural purposes both within and without the parent project boundaries. This is not per se unlawful, however. Although the original Reclamation

Act of 1902, 43 U.S.C. 411 et seq., contemplated the provision of water only for irrigation purposes, this restrictive scope has been substantially broadened by subsequent amendatory legislation. See generally, City of Fresno v. California, 372 U.S. 627 (1963). Thus, by 1906 the Secretary of the Interior was authorized to supply water to "towns or cities on or in the immediate vicinity of irrigation projects." See 43 U.S.C. 567. The Act of 1920, 43 U.S.C. 521, and the Reclamation Act of 1939, See 43 U.S.C. 485h(c) (authorizes the Secretary to furnish water for "municipal water supply or miscellaneous purposes"), substantially broaden the category of uses eligible for Project waters. It is true that the provision of waters for such alternate uses is expressly made contingent on certain determinations made by the Secretary of the Interior. Thus, the aforesaid Reclamation Act of 1939 provides that the Secretary authorize the use of water for non-irrigation uses only if he determines such uses will not impair the efficiency of the Project for irrigation purposes." See 43 U.S.C. 485h(c); see also 43 U.S.C. 521. Nothing in the present record, however, indicates or establishes that the Objector Bureau of Reclamation has not validly made such determinations and therefore there is not basis for suggesting that the Bureau's uses of water are beyond the purview of duly delegated authority.

The record also reflects that the Bureau has executed various "Warren contracts," and that some of the Project waters are being used by individual non-project irrigators pursuant to them. Such contracts and uses are perforce of statute defeasible in the

event of need for such waters within the confines of Project boundaries. See 43 U.S.C. 523. However this provision may relate to the users of project waters inter se, it cannot be read to authorize future users of the water resource to infringe upon available water supply for all Project purposes to the extent of such "Warren contract" quantities. Such a reading would make such contracts contingent upon not only needs within the Project boundaries, but also upon the needs of the entire basin generally.

The only particular use of the Bureau of Reclamation in its "Milk River Project" that even suggests controversy on its face is that water use devoted to fish and wildlife purposes in Bowdoin Wildlife Refuge. Whether or not such a use of water is a "miscellaneous purpose" within the meaning of 43 U.S.C. 485h(3) is to be determined from the overriding legislative intent apparent from the Reclamation Act. Since pursuant to this sated section, contracts for such alternative uses must return at least part of the Project's cost, it is arguable that Congress did not intend that fish and wildlife be among the number of authorized alternative uses since "public uses" do not in the ordinary course of events produce revenues sufficient to sustain such charges. Compare, 43 U.S.C. 485h(a)&(b) (costs for flood control and navigation nonreimbursable). It is also noteworthy in this general regard that the Act of June 21, 1903, 77 stat. 68, which provided for the renewal of contracts for these alternate uses, specifies and mentions only municipal, domestic, and industrial water supplies. In contradistinction, Congress when it has

intended to authorize fish and wildlife uses in a reclamation project has often been explicit in its delegation of authority. See generally 43 U.S.C. 616(i), 43 U.S.C. 614(c), 16 U.S.C. 695(c). The first general recognition of fish and wildlife values by Congress is reflected in the Fish and Wildlife Coordination Act of 1958. See 16 U.S.C. 661 et seq. However, that provision applies only to projects not substantially completed by the effective date of the Act, and thus the terms thereof are inconsistent with the priority claimed by the Objector Bureau here. See 16 U.S.C. 662(c), (c), 616 U.S.C. 663(c). The Water Project Recreation Act, 16 U.S.C. 460 1-(12) et seq., which is supplementary and amendatory to the Fish and Wildlife Coordination Act, is also inconsistent with inherent fish and wildlife authority pursuant to the Reclamation law. This provision again recognizes the value of recreation in fish and wildlife resources, but subjects their development in large measure to Federal-State cooperative schemes. See 43 U.S.C. 460 1-(13), 460 1-(14). The comprehensive treatment of the subject therein is at odds with any previously existing authority. Nor can this collection of provisions be given retroactive effect so as to salvage prior fish and wildlife uses pursuant to Reclamation waters. See U.S.C. 460 1-(18), 460 1-(16), 460 1-(20); see generally, Sierra Club v. Froehlke, 534 F.2d 1289 (8th. Cir. 1975).

It is not necessary, however, in the present circumstances, to finally resolve this issue, because the record is barren of any evidence indicating precisely what quantity the Objector

Bureau uses for fish and wildlife purposes. It is therefore impossible to determine whether and to what extent the reallocation of this fish and wildlife supply would satisfy obviously legitimate uses of the Project waters, and therefore it is impossible to determine to what extent these fish and wildlife waters are unappropriated insofar as the Applicant is concerned. It thus need not be determined herein whether any specific authority exists for this fish and wildlife use, nor whether such uses constituted "beneficial uses" pursuant to Montana law prior to the effective date of the Montana Water Use Act. See generally, Paradise Rainbow v. Fish & Game Comm., 148 Mont. 412, 421 P.2d 717 91966).

It substantially appears by the evidence herein that there are no unappropriated waters available in the Milk River system prior to March 1 of any given year nor subsequent to April 30 of any such year. It is true that localized rain storms occur on a continuing basis both before and after such periods. However, it also appears that those rain storms capable of producing sufficient volumes of water to overrun the Bureau's diversion facilities are so rare that in practice it would be unadministratable to account for them. It is also apparent from the record that there will be no unappropriated waters available for the Applicant even during the above-referenced time frame in many years. The record fairly establishes that whenever the Bureau's Vandalia Dam structure fails to spill water, there are unappropriated waters upstream in the Milk River system. Such spills at Vandalia Dam almost inevitably occur in the high spring

CASE # 26858

flow period, although there will be a substantial number of years in which this structure will fail to spill at all.

The Boundary Waters Treaty of 1909 between the United States and Canada is of no effect to the determination of unappropriated water in the present circumstances. It is true that by the terms of the International Joint Commission Order implementing the aforesaid treaty, Canada is entitled to a substantial quantity of the Milk River. However, the Applicant herein is located downstream from the Milk River crossing of the International Boundary. He cannot therefore interfere with waters allocated from the Milk to Canada. Applicant must, however, proceed at his own peril. The evidence herein demonstrates that if Canada develops its Milk River resources to its full allocated share, the instances of unappropriated water within the United States will be minimal. Thus, Applicant must shoulder a risk that the capital investments required to implement his diversion scheme will be rendered worthless in the face of subsequent Canadian development.

The Department's Milk River study has been discounted in the evaluation of the existence of unappropriated water. The analysis set forth therein is most perfunctory and conclusionary, and it sheds no light on the data sources which form the basis for its conclusions. Moreover, the conclusions drawn therein are at variance with the testimony of Objector Bureau of Reclamation herein.

12. The appropriation that is claimed herein will adversely affect the rights of the Objector Bureau of Reclamation.

Unappropriated water exists for Applicant's use only subsequent to March 1 of any given year and prior to April 30 of such year. Moreover, whenever Vandalia Dam fails to spill, there are ^{not} ~~unappropriated~~ waters in the upstream reaches of the Milk River system. Whenever the Applicant diverts and uses such ~~unappropriated~~ waters, adverse effect to the Bureau of Reclamation will necessarily result.

← sec Fo
sec Fo

It is true that Applicant's diversions to the tune of 500 acre-feet per year will have so slight an effect in and of themselves that they would be immeasurable at any of the Bureau of Reclamation's facilities. This does not make the Applicant's proposed interferences trifling, however. The fundamental rule remains "first in time, first in right." The first to apply water to a beneficial use is entitled to the maintenance of that use against all subsequent appropriators. WCA 85-2-401(1) (1979); WCA 85-2-406(1) (1979). The substantive protection this doctrine affords cannot be undermined by the sanctioning of a multitude of small and relatively innocuous uses of water that in the aggregate would represent major depletions to downstream uses. Such a piecemeal approach denies individual accountability where such singular diversions also form the predicate for marked frustration of water-dependant enterprises. The "finger-pointing" that this approach suggests contemplates procedural flexibility that is belied by the substantive doctrine it serves to implement. It is therefore apparent that the

present application must be conditioned so as to forestall any interferences with the Bureau's prior rights. See MCA 85-2-312(1) (1979).

The exercise of this regulatory jurisdiction is no easy matter in the present circumstance, however. Conditioning Applicant's diversions for storage to those times that the Bureau of Reclamation's Vandalia Dam spills water would result in a de facto denial of the application. The evidence herein indicates that accretions to the Milk River supply occur on a relatively sporadic basis and that the waters that form the supply typically run for only short periods of time at relatively high volumes. Thus, in light of the distance in river miles between the Vandalia Dam and Applicant's proposed reservoir site, the deferment for reservoir storage until the time of Vandalia spill would typically result in little or no water being available in the proposed source of supply at the time of such Vandalia spills. Incorporation of this condition would thus frustrate this state's policy of fostering and encouraging the storage of water. See generally Donich v. Johnson, 77 Mont. 229, 250 P. 663 (1926), Federal Land Bank v. Morris, 112 Mont. 445, 116 P. 2d 1007 (1941).

However, by virtue of the storage character of the present application, it appears feasible to condition the present application to provide for diversions for storage at any time between March 1 and April 30, inclusive, with a system for providing for the releases of such waters stored in the event that Vandalia Dam failed to subsequently spill. In this light,

CASE # 26858

E2A3

it is noted from the record that the Applicant herein intends to use these waters mainly as a late-irrigation supply, and therefore no substantial prejudice would accrue to the Applicant by restricting the use of any waters stored to times after April 30 of any given year. Thus, any temporary retention of the waters claimed herein at times when the Bureau's rights have not been satisfied will only result in a minor quantity of incidental evaporation and seepage that will be lost to the source of supply. Likewise, the temporary deprivation of water at such times to the Bureau will work no hardship to its water uses. It is the lack of water available from storage for the late-season uses that plagues the Objector Bureau. The Hearings Examiner thus concludes that the following schedule reasonably protects the Bureau's prior rights.

Firstly, the Applicant herein shall not use the waters provided herein until after April 30 of any given year. Diversions for storage may occur only from March 1 through April 30, inclusive, of each year. On April 1 of any given year, or at such later time that Applicant actually begins diversions for storage, the amount remaining in storage from the last year's use shall be estimated and recorded and shall be part and parcel of the next ensuing year's limit. See HCA 85-2-312(1) (1979) ("The Department may issue a permit for less than the amount of water requested, but in no case may it issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the Application.") Such waters remaining in storage shall in all events be free from the call of

the Objector Bureau herein, as they form no part of the natural supply of the Milk River.

Thereafter, the Applicant may divert for storage, but shall, at intervals no greater than 14 days, re-release the waters diverted into storage during such 14-day period if Vandalia Dam fails to spill during such two-week period. This schedule shall be adhered to throughout the period provided for herein for diversions for storage, and Applicant must keep adequate records to implement this schedule.

13. There are no permits or water reservations apparent from the face of the record that may be affected by the exercise of Applicant's claimed appropriative right.

WHEREFORE, based on these Findings of Fact and Conclusions of Law, Application for Beneficial Water Use Permit No. 26858-s40E is hereby granted to I X Ranch Co. to appropriate and store up to 500 acre-feet per year at a rate not to exceed 12 cubic feet per second. Diversions for storage shall in no event take place prior to March 1 of any given year, nor subsequent to April 30 of any given year. The use of the waters so stored shall be supplemental flood and sprinkler irrigation of 2760 acres, more or less, comprised of the following parcels: 160 acres in the SE1/4 of Section 19, Township 28 North, Range 13 East; 320 acres in the W1/2 of Section 20, Township 28 North, Range 13 East; 120 acres in the SW1/4 and 40 acres in the NE1/4 and 80 acres in the SE1/4 of Section 28, Township 28 North, Range 13 East; 320 acres in the W1/2 and 40 acres in the SW1/4, SE1/4 of Section 29,

Township 28 North, Range 13 East; 80 acres in the S1/2 NE1/4 and 80 acres in the N1/2 SE1/4 of Section 30, Township 28 North, Range 13 East, 320 acres in the E1/2 and 80 acres in the E1/2 NE1/4 of Section 31, Township 28 North, Range 13 East; 160 acres in the NE1/4 and 160 acres in the SW1/4 and 160 acres in the SE1/4 and 80 acres in the S1/2 NE1/4 and 40 acres in the NW1/2 NE1/4 of Section 32, Township 28 North, Range 13 East; 80 acres in the W1/2 NE1/4 and 160 acres in the NW1/4 and 160 acres in the SW1/4 and 80 acres in the W1/2 SE1/4 and 40 acres in the SE1/4 SE1/4 of Section 33, Township 28 North, Range 13 East, all in Chouteau County. The period of use of the water so stored shall be between May 1 and September 30, inclusive, of each year. The point of diversion for the waters claimed herein shall be a dam located in the NE1/4 SW1/4 SW1/4 of Section 8, Township 27 North, Range 14 East, all in Chouteau County. The source of supply shall be Godfrey Creek, a tributary of Big Sandy Creek. The priority date for this permit shall be March 10, 1980, at 10:34 a.m.

This permit is subject to the following express conditions, restrictions, and limitations.

A. Any rights evidenced herein are subject to all prior and existing rights, and any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize the Permittee to interfere with the natural flows of Godfrey Creek to the detriment of any senior appropriator.

CASE # 26858

D. This permit is also subject to the rights of the Water and Power Resources Service (now known as the Bureau of Reclamation) of the United States of America to use the waters of the Milk River Basin for agriculture, irrigation, municipal, domestic, industrial, and any other authorized purpose pursuant to its "Milk River Project". Whenever Vandalia Diversion Dam spills water, the Water and Power Resources Service's water claims have been satisfied, and there are unappropriated waters available for the Applicant that may be diverted without adverse affect to the Water and Power Resource Service. "Spilling" as used herein refers to waters passing over the diversion structure known as Vandalia Diversion Dam.

C. Nothing herein shall be construed to affect or reduce the Permittee's liability for damages that may be caused by the exercise of this permit. Nor does the Department of Natural Resources and Conservation in issuing this permit acknowledge any liability for any damages caused by the exercise of this permit, even if such damage is the necessary and unavoidable consequence of the same.

D. The Permittee shall in no event cause to be diverted from the waters stored pursuant to this permit more water than is reasonably required for the purposes provided for herein. At all times when water is not reasonably required for these purposes, Permittee shall cause or otherwise allow the waters to remain in storage.

E. Permittee shall diligently adhere to the terms and conditions of this Order. Failure to adhere to the terms and conditions may result in the revocation of this permit.

CASE # 26858

CASE # 26858

F. Permittee shall not divert at its existing ditches from Big Sandy Creek more water pursuant to this Permit than is discharged or released from the reservoir provided for herein.

G. In all events, at such times that Applicant succeeds in capturing 500 acre-feet in the storage structure provided for herein, inflows must be equivalent to outflows until the time of diversion for storage in the next ensuing year.

H. On March 1 of any given year, or at such later times that Permittee actually begins diversion for storage pursuant to this Permit, Permittee shall estimate and record the amount remaining in storage at such time, which quantity shall be part and parcel of the current year's appropriative limit. Thereafter, at periods no greater than 14 days duration, Permittee shall insure himself that spills have occurred at the Water and Power Resources Service's Vandalia Dam. In the event that waters fail to spill at Vandalia Dam during any such two-week interim, Permittee shall release the water stored during such 14-day period for downstream use. Permittee shall continue to monitor and record water levels in the storage structure provided for herein at such two-week intervals throughout the period provided for herein for diversions into storage.

NOTICE

This Proposed Order is offered for the review of all parties of record. Exceptions and objections to this proposed order must be filed with and received by the Department of Natural Resources

CASE # 26858

* 3342

and Conservation on or before January 29, 1982.

DONE this 11th day of January, 1982.

Matt Williams
Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449-3962

CASE # 26858

AFFIDAVIT OF SERVICE

Proposal for Decision

STATE OF MONTANA

) ss.

County of Lewis and Clark

Beverly J. Jones, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That pursuant to the requirements of Section 85-2-309, MCA, on January 11, 1981, he deposited in the United States mail, "certified mail", an Order by the Department on the application by I X Ranch Co., Application No. 26858, for a Permit to Appropriate Water, addressed to each of the following persons or agencies:

Certified #'s 52391-52398

1. Harlem Irrigation District, Box 383, Harlem, MT 59526
2. U. S. D. I. - Bureau of Reclamation, Box 2553, Billings, MT 59103
3. Zurich Irrigation District, Box 549, Chinco, MT 59523
4. Alfalfa Valley Irrigation District, Box 1147, Chinook, MT 59523
5. Glasgow Irrigation District, Box R, Malta, MT 59538
6. Dodson Irrigation District, Box R, Malta, MT 59538
7. Malta Irrigation District, Box R, Malta, MT 59538
8. I X Ranch Co., c/o Arthur H. Roth, Jr., Pres., Box 489, Big Sandy, MT 59520
9. Bob Larson, Havre Area Office, (regular inter-department mail)
10. Matt Williams, Hearing Examiner, DNRC, Helena, (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by _____

STATE OF MONTANA

) ss.

County of Lewis & Clark

On this 11th day of January, 1981, before me, a Notary Public in and for said State, personally appeared Beverly J. Jones, known to me to be the Hearing Recorder, of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John R. [Signature]
Notary Public for the State of Montana

Residing at Helena, MT

My Commission Expires 1/21/84

Case # 26858

43840